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Nos. 83-21 and 83-32

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI COMMUNICATIONS CORPORATION and
MCI TELECOMMUNICATIONS CORPORATION,
Respondents.

MCI COMMUNICATIONS CORPORATION and
MCI TELECOMMUNICATIONS CORPORATION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON AND WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Brief Submitted Pursuant To Rule 36

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INTEREST OF THE STATE OF WASHINGTON AND WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Washington and WUTC represent the interests of the state, its

businesses and general public in proceedings before federal courts in which there is at issue matters affecting rates or practices for utility services. WUTC vs. FCC, 513 F.2d 1142 (9th Cir. 1975), Chapter 49, § 1, Laws of Washington of 1967, 1st Ex. Sess., RCW 80.01.075. The decision of the District Court, which was affirmed in part by the Court of Appeals on the issue of liability, was the result of the submission by the District Court of a key legal issue determining liability to the jury. The state and the WUTC are concerned that this procedure subjects antitrust damage suits to the vagaries of lay legal interpretation. The decision may result in the imposition of substantial unproductive costs on an exchange telephone company within the jurisdiction of

WUTC. The Court of Appeals remanded the proceeding to the District Court for a new trial limited to the issue of damages. The judgment entered by the District Court against AT&T was in the amount of $1.8 billion. Under the order of Judge Greene in U.S. vs. AT&T, D. DC. Misc. No. 82-0025, July 8, 1983, liabilities of AT&T for pre-divestiture activities leading to antitrust damage judgments will be shared by the local Bell operating companies after divestiture, in proportion to the assets of each operating company compared to the assets left to AT&T.

The WUTC opposed the application of MCI to build a competing interstate network before the Ninth Circuit Court of Appeals, WUTC v. FCC, 513 F.2d 1142 (1975), on the ground that

allowing MCI to under cut the average price system threatened the universal service which had been national policy since 1934.

An increase in unproductive capital costs in the magnitude involved here which could result in increased rates for local consumers for Pacific Northwest Bell's service, would be inimical to the purposes of efficiency and consumer benefit which underlie the antitrust laws. Such an increase would also curtail the ability of the State of Washington to secure for itself, its businesses and general public, quality telephone service at rates which are fair, just, reasonable and sufficient. The State of Washington and WUTC support AT&T's petition and cross petition, for these reasons.

REASONS FOR GRANTING THE WRIT

Two petitions for certiorari have been filed. AT&T's petition seeks reversal of the Court of Appeals' decision to limit the remand on the remaining interconnection charges to damages only. MCI's petition seeks review of the Court of Appeals' pricing and damages determinations. Moreover, AT&T is filing a cross petition seeking review of the Court of Appeals' affirmance of the liability findings on interconnections.

It is the position of the State of Washington and WUTC that this case should be reviewed by the Court and reversed with either judgment being rendered for AT&T or at the very least with a new trial being granted on issues of both liability and damages.

Accordingly, we are supporting AT&T's petition and cross petition.

The petitioner AT&T has presented a narrow question for review which, in light of the massive impact of the potential liability involved in this proceeding on many millions of local exchange ratepayers nationwide, at a time when the forces of change in the telecommunications industry are affecting local exchange rates, should be examined by this Court. The Court of Appeals erred in weighing the effect of federal and state regulation of the telephone service provided by AT&T on the issues pertaining to liability under the antitrust laws. The Court of Appeals erred in upholding the submission to the jury of the issue of the meaning of the Specialized Common

Carriers decision, 29 F.C.C.2d 870 (1971), as it bore on the question of the reasonableness of AT&T's conduct in refusing to interconnect certain facilities with respondent MCI.

If the holding of the Court of Appeals is permitted to stand, a judgment against AT&T after a new trial could produce an obligation on Pacific Northwest Bell, the Bell operating company which serves in Washington, of millions of dollars for its Washington operations. As a regulated utility, Pacific Northwest Bell is constitutionally entitled to rates sufficient to cover its capital costs incurred in providing services. Antitrust liability judgments can affect capital costs by increasing those costs.

ARGUMENT

The Court of Appeals erred in not being sufficiently sensitive to the convulsive changes which are in progress in the of telecommunications industry. Although the Court of Appeals recognized the subtle, and at times paradoxical, relationship between the policies which led Congress to enact the Communications Act and those which led to the antitrust laws, the court below failed to address this relationship, declaring instead that regulators and Congress would deal with the broader issues. The result of this approach is to ignore the fact that "drastically modifying" the regulatory judgment which has guided the telecommunications industry for more than seventy-five years, at the stroke of a pen, can produce unintended harsh

results on the consumers if slavish devotion is paid to the form, rather than the substance of the "populist" principles embodied in the antitrust laws. (Appendix, at 42a). When the regulatory agency which is spurring change fails to speak clearly, the requisite notice of forbidden conduct which would support antitrust liability is absent. The fact that MCI, the plaintiff below, interpreted the agency's decision in opposite ways on this point, depending on the court and MCI's purpose, justifies reversing the Court of Appeals' decision upholding the liability judgment.

The Court of Appeals erred in upholding the trial court's submission to the jury of the issue of the meaning of the Specialized Common Carriers

decision, 29 F.C.C.2d 870 (1971).

In the Court of Appeals' opinion, which is remarkable for its silence on the bizarre result produced at trial, the Court offhandedly, and erroneously, upheld the submission of a legal issue, namely the construction of an administrative rulemaking order, to a jury. It is the duty of the court to find and apply the law. It cannot be dismissed as "harmless error" to charge a jury to construe a legal document issued by a regulatory agency of the United States government which the District Court described as an "abomination." (Appendix, at 12a). The trial court abdicated the judicial function, and the Court of Appeals upheld such abdication. If the FCC's decision in the Specialized Common Carriers case was

so murky that the judge could not construe it to answer the question whether AT&T was legally required to interconnect MCI to foreign exchange (FX) and common control switching arrangement (CCSA) facilities, then the judge should have directed a verdict in favor of AT&T, on either of the two grounds submitted to the jury, i.e., that by its terms the 1971 decision did not explicitly order interconnection, or that the context in which the interconnection was ordered was so vague that AT&T did not know it was ordered. The court's finding that the order was "extremely opaque" (Appendix, at 89a), is at war with a finding that refusals to interconnect violated the antitrust laws.

The status quo before the

decision in the Specialized Common Carriers case was that MCI had no authority to provide service requiring FX and CCSA interconnection. The unintelligible Specialized Common Carriers decision, then, could not be presumed to change the status quo. In fact, during the appeal of the Specialized Common Carriers decision to the Ninth Circuit Court of Appeals, both MCI and the FCC advised that court in their briefs that no connections to the switched network were contemplated by the decision. WUTC vs. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied., 423 U.S. 836. (Appendix 240a).

The important point is that AT&T's refusal to provide interconnected service to MCI did not violate the antitrust laws, notwithstanding the

later Execunet decision, [MCI Telecommunication Corp, 60 F.C.C.2d 25 (1976)], because even the trial court could not understand the Specialized Common Carriers decision. Alleged bad faith on the part of AT&T in denying interconnection is irrelevant, as long as an objective assessment of the relevant circumstances indicated that MCI did not have the clear legal power to provide the service for which it was seeking connections.

CONCLUSION

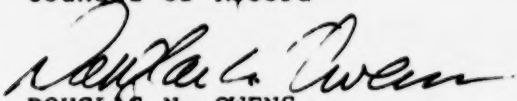
This Court should grant the Petition for Certiorari and should reverse the decision of the Court of Appeals below, to the extent the latter affirmed liability against AT&T. The question presented has continuing vitality for administrative decision-making and antitrust law. Also, the

outcome of the battle between financial giants may have unforeseen results on consumers of local telephone service.

Dated this 10th day of August, 1983.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General
Counsel of Record



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CERTIFICATE OF SERVICE

I, Douglas N. Owens, am a member of the Bar of this Court and am one of the attorneys representing State of Washington and Washington Utilities and Transportation Commission. Pursuant to Rule 28.5, I hereby certify that I have caused three copies of the Brief Amicus Curiae of the State of Washington and Washington Utilities and Transportation Commission to be served by placing the same in properly addressed envelops with first-class postage prepaid, in the United States mail on this 10th day of August, 1983 to: Chester T. Kamin, Jenner & Block, One IBM Plaza, Chicago, Illinois 60611; Alfred Y. Kirkland, Jr., Brady, McQueen, Martin, Collins & Jensen, 80 Fountain

Square Plaza, Elgin, Illinois 60120; Raymond C. Fay, Haley, Bader & Potts, 77 West Washington Street, Chicago, Illinois 60602; John R. Worthington, MCI Communications Corporation, 1133 19th Street, N.W., Washington, D.C. 20036; and Theodore N. Miller, Sidley & Austin, One First National Plaza, Chicago, Illinois 60603. I further certify that all parties required to be served have been served.

DOUGLAS N. OWENS
Assistant Attorney General

August 10, 1983